# MAYOR & COUNCIL AGENDA COVER SHEET

#### **MEETING DATE:**

November 6, 2006

#### CALL TO PODIUM:

Fred Felton, Assistant City Manager

**RESPONSIBLE STAFF:** 

Fred Felton, Assistant City Manager

#### **AGENDA ITEM:**

(please check one)

	Presentation	
	Proclamation/Certificate	
	Appointment	
	Public Hearing	
	Historic District	
	Consent Item	
	Ordinance	
X	Resolution	
	Policy Discussion	
	Work Session Discussion Item	
	Other:	

#### **PUBLIC HEARING HISTORY:**

(Please complete this section if agenda item is a public hearing)

Introduced	
Advertised	
Hearing Date	
Record Held Open	
Policy Discussion	

# TITLE:

Resolution of the Mayor and City Council Authorizing the City Manager to Negotiate and Execute Road Participation Agreement with Montgomery County, and BP Realty Investments, LLC for the Dedication of Land, Design, Development and Construction of Watkins Mill Road Extended

### SUPPORTING BACKGROUND:

On July 17, 2006, the Mayor and City Council approved a resolution authorizing the City Manager to execute a Memorandum of Agreement with Montgomery County and BP Realty, LLC on Watkins Mill Road Extended. The agreement was executed shortly thereafter, and was used as a basis for developing a binding road participation agreement.

The City Manager's Office, Montgomery County Department of Public Works and Transportation, and BP Realty Investments, LLC have reached general agreement on a road participation agreement for the full build out of Watkins Mill Road Extended.

In conjunction with land use approvals for Monument Realty, Casey West, and Casey East, developers are obligated to dedicate all the necessary right-of-way for the construction of Watkins Mill Road Extended. As part of the Casey West approval, BP Realty Investments, LLC was required to construct four lanes of Watkins Mill Road Extended from MD 117 to I 270; however, subsequent to the approval it was determined that Watkins Mill Road Extended should be six lanes to handle anticipated traffic volumes.

Pursuant to the agreement, Montgomery County impact taxes collected from development at Casey East, Casey West, the Monument Office Park, and McGowan Tract may be dedicated to the Watkins Mill Road project.

-Continued-

# **DESIRED OUTCOME:**

Staff recommends approval of the resolution

# MAYOR & COUNCIL AGENDA COVER SHEET

#### SUPPORTING BACKGROUND CONTINUED

In addition, the City will contribute to the cost of the County's participation, 50% of the total permit fees paid by the developer for the four lane bridge over the CSX right-of-way and for both segments of Watkins Mill Road Extended. The agreement will provide for the complete build out of the road to be completed in two years.

For your review, I have attached the latest version of the agreement. While there may be some minor modifications prior to execution, the City's obligations will not change.

It is anticipated that the Montgomery County Council will approve this agreement during their November 28, 2006 meeting.

Attachments

RESOLUTION NO.	
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RESOLUTION OF THE MAYOR AND CITY COUNCIL AUTHORIZING THE CITY MANAGER TO NEGOTIATE AND EXECUTE ROAD PARTICIPATION AGREEMENT WITH MONTGOMERY COUNTY, AND BP REALTY INVESTMENTS, LLC FOR THE DEDICATION OF LAND, DESIGN, DEVELOPMENT AND CONSTRUCTION OF WATKINS MILL ROAD EXTENDED

WHEREAS, the construction of Watkins Mill Road Extended from MD355 to MD117 has been a long standing regional transportation priority; and

WHEREAS, pursuant to various development approvals, BP Realty Investments, LLC, is obligated to dedicate the land for and construct a portion of Watkins Mill Road Extended; and

WHEREAS, pursuant to the Casey East approval (Z-301), BP Realty Investments, LLC is required to dedicate land to Montgomery County for the new 6<sup>th</sup> District County Police Station; and

WHEREAS, the Memorandum of Understanding between the City of Gaithersburg and Montgomery County (R-1-06) approved by the Mayor and City Council on January 3, 2006 concerning the expenditure of Montgomery County Impact Tax funds provided that Impact Tax funds collected for development within the City of Gaithersburg may be used for the construction of Watkins Mill Road Extended; and

WHEREAS, this Road Participation Agreement will provide for the complete build out of Watkins Mill Road Extended:

NOW THEREFORE, BE IT RESOLVED, by the Mayor and City Council of Gaithersburg, that the City Manager be and he hereby is authorized and directed to negotiate and execute a Road Participation Agreement with Montgomery County and BP Realty Investments, LLC for the dedication of land, design, development and construction of Watkins Mill Road Extended.

ADOPTED by the City Council this 6th day of November, 2006.

	SIDNEY A. KATZ, MAYOR and President of the Council
THIS IS TO CERTIFY that the foregoing Resolution was adopted by the City Council in public meeting assembled on the 6 <sup>th</sup> day of November, 2006.	
David B. Humpton, City Manager	

# **ROAD PARTICIPATION AGREEMENT**

(Watkins Mill Road Extended)

THIS ROAD PARTICIPATION AGREEMENT (the "A	GREEMENT") is made
this day of, 2006, pursuant to Mon	tgomery County Code
(2004), as amended §49-6, by and among BP REALTY IN	VESTMENTS, LLC, a
Maryland limited liability company ("BP"), GAITHERSBU	JRG, MARYLAND, a
Maryland municipal corporation (the "City"), and MONT	GOMERY COUNTY,
MARYLAND, a body corporate and politic and a political sub	division of the State of
Maryland (the "County") (BP Realty Investments, LLC, the	City, and the County
sometimes together being referred to as the "Parties").	

#### RECITALS:

- A. BP Realty Investments, LLC is the fee simple owner of certain property located in Gaithersburg, Maryland, as shown by cross-hatching on the tax map attached to and made a part of this Agreement as <u>Exhibit "A"</u> (the "BP Tract").
- B. The Parties have entered into a Memorandum of Agreement (MOA) for the Dedication of Land, Design, Development and Construction of Watkins Mill Road, dated August 3, 2006, attached to and made part of this Agreement as Exhibit "B".
- C. The City has approved Schematic Development Plans for the BP Tract (the "BP Schematic Development Plan") that provides for a mix of uses that include 382 residential units and office, restaurant, retail, service station, and public uses on approximately 40.10 acres of land known as Casey East; and the development of approximately 1,075 dwelling (single-family detached, single-family attached, two-over-two condominium, and high-rise condominium) units, 259,939 square feet of mixed use commercial space and 936,650 square feet of office space on 125.21 acres of land known as Casey West.
- D. The BP Tract will be served by the extension of Watkins Mill Road from its current terminus approximately 1,200 feet north of Clopper Road (MD Route 117) to its intersection with Frederick Road (MD Route 355) (the "Watkins Mill Road Extension"). The Watkins Mill Road Extension is shown on the plan attached to and made a part of this Agreement as <a href="Exhibit "C"">Exhibit "C"</a>. Segment 1 of the Watkins Mill Road Extension (the "West Side Project") will extend from the limit of existing Watkins Mill Road on the west side of I-270 to the southbound ramps of the planned Watkins Mill Road Interchange at I-270 ("the State Project"). Segment 2 will extend from the existing intersection of Watkins Mill Road at MD 355 to the northbound ramps of the same interchange, (the "East Side Project"). The term Watkins Mill Road Extension as used herein shall refer to the East Side Project and the West Side Project collectively.
- E. The County is undertaking Facility Planning Phase II for the Watkins Mill Road Extension under Capital Improvements Project No. 509337.
- F. The County has approved funding to participate in the construction of the Watkins Mill Road Extension under Capital Improvements Project No. 500722, State

Transportation Participation on MMM DD, YYYY. Neither BP or the County shall be under any obligation to proceed under the terms of this Agreement until such time as the County shall have appropriated sufficient funds to pay the County's Pro Rata Share of Project Costs in accordance with the terms of this Agreement.

- G. BP acknowledges that the construction of the Watkins Mill Road Extension is an important public project being undertaken at the request of BP to facilitate development of its land. BP further acknowledges that once undertaken time is of the essence to complete the Watkins Mill Road Extension to protect to public's interests; protect public health and safety; and to keep expenditures of public funds reasonable.
- H. The Parties have determined that the most efficient and expeditious manner of constructing the Watkins Mill Road Extension is for BP to design and construct the Watkins Mill Road Extension, with the County contributing a share of the cost of such improvements for the East Side Project.
- I. The Parties agree that this action will contribute to the acceleration of the I-270 Interchange at Watkins Mill Road, in accordance with the "Joint Priority Letter" from the County Executive and Council to the County Delegation in Annapolis, dated November 2, 2005 and referenced as <u>Exhibit "D"</u>.
- J. The City will contribute impact taxes, permit fees and other considerations to the Watkins Mill Road Extension and the State Project as outlined in Exhibit B.

NOW, THEREFORE, in consideration of the foregoing Recitals, each of which is incorporated into and made a part of this Agreement, and the mutual covenants of the Parties set forth below, and for other good and valuable consideration, the receipt and sufficiency of which each of the Parties acknowledges, BP, the City, and the County agree as follows:

#### ARTICLE 1: Description of Work; Responsibility

- 1.1 <u>Scope of Work.</u> In accordance with the Memorandum of Agreement for the Dedication of Land, Design, Development and Construction of Watkins Mill Road, dated August 3, 2006, BP has elected to proceed with the construction of Segment 1, at its own cost, under permit to the City of Gaithersburg. The work which is the subject of this Agreement is the design and construction of the East Side Project. The East Side Project includes construction or installation of all of the improvements to be shown on the "Plans" (defined in Section 2.1), as may be modified in accordance with Section 2.2 or by authorized change orders in accordance with Section 3.3.
- 1.2 <u>Responsibilities of the Parties</u>. Subject to the terms of this Agreement, BP shall be responsible for designing and constructing or causing the construction of the East Side Project, including the administration of the construction contract. The County shall be responsible for advertising the East Side Project, overseeing paying a portion of the Project Costs, as set forth in Section 5.1 below, overseeing the administration of the

construction contract to ensure proper use of public funds, and approving Source of Supply submittals. The City shall be responsible for issuing permits, inspections of the bridge and road, and contributing impact taxes and permit fees and other considerations as outlined in <u>Exhibit "B"</u>.

## **ARTICLE 2: Planning and Design of the Improvements**

- 2.1 <u>Engineering</u>. BP must retain, at its sole expense, an engineering firm (the "Project Engineer") to prepare the complete plans and specifications for the East Side Project (such plans and specifications being referred to collectively as the "Plans"). Among other things, the Plans must show the alignment of and rights-of-way required for the East Side Project.
- 2.2 <u>Modifications of Plans</u>. BP shall have the right to recommend such changes to the Plans, after approval by the County, as BP may deem appropriate. All such changes shall be subject to the prior written approval of the County in accordance with Article 8 below.
- 2.3 <u>Project Engineer Insurance</u>. BP must submit to the County for approval, its agreement with the Project Engineer. BP must also submit the Project Engineer's Certificate of Insurance to the County for approval. BP must require the consultant to maintain insurance at the levels required by the County's Office of Risk Management. BP must amend its agreement with the Project Engineer as necessary to obtain County approval, prior to the advertisement of the East Side Project for bids.
- 2.4 <u>Plan Approval</u>. BP must submit the East Side Project construction plans to the Montgomery County Division of Capital Development and the City, for review and approval at the completion of the preliminary and final design stages, and at additional intermediate stages as directed by the County, as detailed in Article 8: Approval Procedure. BP shall also forward the construction plans to the Maryland State Highway Administration for review on accordance with Section 8.3 hereof.
- 2.5 <u>Permits</u>. BP must apply for and obtain all required governmental approvals and permits before constructing the improvements.

### **ARTICLE 3:** Estimate; Constructions Contract

3.1 <u>Estimate</u>. At or before the time that BP submits the Plans to the Division of Capital Development for final approval, BP must also submit to the Division of Capital Development the Project Engineer's estimate setting forth the anticipated costs of the various elements of the East Side Project (the "Estimate").

### 3.2 <u>Bidding: Construction Contract.</u>

(a) In accordance with the MOA, the Developer has elected to build the West Side Project at its cost, with the understanding that the County has taken that into consideration in determining the County's Pro Rata Share of Project Costs under this Agreement. All references herein to the construction contract will be for the East Side Project. After the Plans and Estimate have been approved by the Division of Capital Development and all necessary governmental approvals and permits have been obtained, and at such time as BP is ready to commence construction of the East Side Project in accordance with Section 4.1 (a), the County will advertise for bids for the construction of such project under the County's procurement procedures. The bid solicitation must require contractors to itemize their bids so that any Non-Shared Costs may be readily allocated between BP and the County in accordance with Section 5.3. Representatives of BP shall be given reasonable advance notice of and shall be entitled to attend the County's opening of the bids.

- (b) If the lowest responsive and responsible bidder is approved by both BP and the County, BP will enter into a contract with the low bidder for the construction of the project. If the lowest responsive and responsible bid is not approved by both BP and the County, the County and/or the BP must supply to the Office of Procurement reasons for not selecting the bidder, and if approved by the Office of Procurement, may either select the next lowest responsive and responsible bidder, or re-bid the project. After opening the offers in the re-bid process, the lowest responsive and responsible bidder must be approved by BP.
- 3.3 <u>Change Orders.</u> BP must follow or cause the contractor to follow the Procedures for Processing Change Orders as required by Montgomery County Code (2004), as amended, Chapter 11B, the County's Procurement Regulations, COMCOR [Code of Montgomery County Regulations] Chapter 11B. Failure to do so will result in the county not participating in the cost of any work covered by the change order, to the extent such work started prior to approval of the change order.

#### ARTICLE 4: **Performance of the Work**

#### 4.1 Commencement and Completion.

(a) BP shall commence construction of the East Side Project on a date, (the "Outside Commencement Date"), not later than sixty (60) days after the later to occur of the following conditions (collectively the "Conditions Precedent") (i) all approvals and permits required for the East Side Project from the County or other governmental authorities, whether under the Agreement or by law or regulations, having been issued (the "Approvals and Permits"), (ii) the County has acquired all third party easements and rights-of-way required for the work, if any, and (iii) the County shall have appropriated sufficient funds to pay its share of Project Costs If the Conditions Precedent are not satisfied on or before December 31, 2007, BP may terminate this Agreement by written notice to the County and the City. In such event, BP and the County shall be relieved of all further liability to one another under this Agreement. After commencing construction of the East Side Project, BP shall cause the work to be diligently prosecuted so that the East Side Project is substantially completed within twelve (12) months after the commencement of the work, subject to Force Majeure (the "Outside Completion Date").

- (b) All work shall be performed in a good and workmanlike manner, in substantial conformance with the Plans, in compliance with all applicable laws and regulatory requirements of the County, and Maryland State Highway Administration Standards and Specifications for Construction and Materials and other specifications approved by the County for this project.
- 4.2 <u>Construction Procedures</u>. The following procedures applicable to both Subdivision Roads and Public Facilities Road Participation Projects, as established by the County Department of Public Works and Transportation ("DPWT"), shall be applicable to the work performed under this Agreement:
- (a) BP and its contractor shall attend a preconstruction meeting with the County and the City.
- (b) BP shall initially bear all Project Costs, including those for utility relocation, but the County shall participate in the Project Costs as set forth in Article 5 and shall be solely responsible for certain Non-Shared Costs as set forth in Section 5.3.
- (c) The duration of the construction permit issued by the City for this project will be in accordance with the City's policies and procedures. Requests for extensions of the permit will be considered on a case by case basis by the City, with concurrence by DPWT, and shall not be unreasonably withheld. BP shall supply the City with documentation to evidence that construction delays were beyond BP's reasonable control. Requests for extension must be submitted and approved prior to the expiration of the permit.
- (d) BP must require the Project Engineer to (i) maintain the daily records of the project in accordance with the County's standard record keeping format; (ii) review monthly payment requests from the contractor and, if such request are proper and ready for payment, certify them to be true and accurate; (iii) prepare final quantities based on the as-built project; and (iv) provide construction management, materials testing, and quality control as would be required for State Highway Administration projects.
- (e) Upon substantial completion of the East Side Project the City and BP shall jointly inspect the work for purposes of establishing a punchlist in accordance with the City's policies and procedures.
- (f) Pursuant to the requirements of Chapter 11B-51 of the Montgomery County Code (2004), as amended, notice is given of the statutory provisions set forth on Exhibit "E" attached to and made a part of this Agreement.

### 4.3 Dedications:

(a) <u>East Side Project</u>. Upon final completion of punchlist items for the East Side Project in accordance with the City's policies and procedures and when the Project Costs of BP and the County have been adjusted, the entire Watkins Mill Road Extension shall be dedicated and accepted by the County for maintenance. The City will

be responsible for snow removal from the Watkins Mill Road Extension for a period of ten (10) years after acceptance by the County, or until such time as the road is turned over to the State Highway Administration, whichever occurs sooner; in accordance with Exhibit "B".

- (b) All dedications are to be as shown on the final plats of subdivision for the BP Tract. BP must also grant to the County or City, without charge and within a public utility easement adjacent to be established adjacent to the right of way for the East Side Project, such easements and right-of-entry on, over, and across the BP Tract as may reasonably be required to facilitate the maintenance of the Watkins Mill Road Extension, including, but not limited to, grading, slope, sediment control, storm drainage, storm water management, utility and temporary construction easements and right-of-entry during design. In addition, BP must also grant to the County, without charge, easements as may be necessary to access stormwater management facilities in the area shown on Exhibit "E" attached to and made a part of this Agreement. To the extent that the areas dedicated deviate from the approved subdivision plats, BP must execute easements prepared and to be recorded by the County dedicating the actual area needed for construction, repair, and maintenance of the Watkins Mill Road Extension together with all appurtenant structures and facilities, including, but not limited to, storm drains, swales, drainage structures, walls, fences, pathways, walkways and bikeways.
- (c) The County grants to BP, its agents and contractors, the right to enter upon the portion of right-of-way for the Watkins Mill Road Extension, as well as all other areas associated with the Watkins Mill Road Extension which have been dedicated to or otherwise acquired by the County or over which the County has obtained easements, for the purpose of performing the work and carrying out the other obligations of BP contemplated in this Agreement.
- (d) <u>Bonds</u>. This Agreement requires that BP maintain or cause its contractor performing the work to maintain performance and payment bonds for completion of the East Side Project and payment of all costs and expenses related to the Project in accordance with the County's General Terms and Conditions for Construction Contracts. The bonds shall name the County and the City as dual obligees. A copy of the General Terms and Conditions are attached to and made a part of this Agreement as <u>Exhibit "F"</u>. The full face amount of the bonds shall remain in place and shall not be reduced until completion of the East Side Project

#### **ARTICLE 5: Allocation of Costs**

### 5.1 <u>Cost Sharing</u>.

(a) BP and the County shall share the "Project Costs" (defined below) in accordance with the following percentages:

BP 22.5 % County 77.5 %

Each party's applicable share of the Project Costs is referred to as its "Pro Rata Share".

- (b) The City will satisfy its share of the "Project Costs" by contributing to following fees and taxes to the County, in accordance with the MOA (Exhibit "B"):
- (i) Fifty percent (50%) of the total permit fees paid by BP for the four lane bridge over the CSX right-of-way and the entire Watkins Mill Road Extension:
- (ii) All the Impact Taxes being held by Montgomery County on the date of the Memorandum of Agreement for the Dedication of Land, Design, Development and Construction of Watkins Mill Road (August 3, 2006) generated within the City of Gaithersburg; and,
- (iii) All future Impact Taxes to be generated by the following developments currently known as: Casey East, Casey West, the Monument Office Park, and the McGowan Tract or successor developments for these tracts regardless of name or developer.
- 5.2 Project Costs. The "Project Costs" means all out of pocket charges, expenses and fees incurred by BP to third parties in connection with the construction of the Watkins Mill Road Extension excluding, however, the Non-Shared Costs referred to in Section 5.3. The Project costs shall include, but not be limited to:
- (a) all costs and expenses incurred by BP pursuant to the terms of the construction contract entered into pursuant to Section 3.2 (the "Contract Price") and any change orders permitted or approved under Section 3.3, including costs associated with the management of the construction contract by BP;
- (b) Permit fees paid to the City of Gaithersburg for the Watkins Mill Road Extension;
- (c) All fees paid to obtain the bonds required by this Agreement and any additional bonds required for the City of Gaithersburg permits;
- (d) all soft costs and expenses incurred by BP in connection with the East Side Project and incurred after the issuance of the building permit for the East Side Project, including without limitation construction related engineering, surveying, supervisory, inspection and certification fees, if any, including the costs of "as-built" drawings, and the costs of supervision, inspection and certification (which shall be solely the City's obligation) as set forth in Section 5.3;
- (e) all license and permit fees set forth on <u>Exhibit "G"</u> attached to and made a part of this Agreement;

- (e) all costs and expenses incurred by reason of any default, misconduct, or negligence on the part of any contractor, subcontractor or supplier, or their agents or employees, in connection with the Watkins Mill Road Extension, such as the cost of correcting defective or nonconforming work, the cost of disposing of materials and equipment wrongfully supplied, the cost of making good any damages to property, and the cost of completing the Watkins Mill Road Extension with substitute contractors, subcontractors, or suppliers;
- (f) all pro-rata costs related to utility installation or relocation, except those specifically excluded as Non-Shared Costs under Section 5.3;
- (g) all costs of constructing the stormwater management facility on the BP Tract, including related appurtenances, that will handle the stormwater runoff from Watkins Mill Road (the "Storm Water Facility"). A single wet stormwater management pond provides water quality and quantity for the portion of the BP Tract north of the Watkins Mill Road extension as well as the entire Watkins Mill Road extension. The Watkins Mill Road extension accounts for -30% of the drainage area directed to the Storm Water Facility. For the purposes of allocating project costs only, the cost to the Watkins Mill Road project will be 30% of the total cost of the Storm Water Management Facility.
- 5.3 Costs Allocable to One Party Only. Certain costs will be incurred in connection with the Watkins Mill Road Extension the Parties intend not be shared but rather paid in full by one party or the other (the "Non-Shared Costs").
  - The Non-Shared Costs payable by BP are, (a) the costs incurred to the Project engineer for designing the East Side Project, as set forth in Section 2.1 hereof, (b) all legal costs associated with the Watkins Mill Road Extension, (c) all costs associated with the coordination with the State for the Watkins Mill Road Extension with the proposed State Watkins Mill Road Interchange at I-270, (d) the costs of designing and constructing public water and sewer lines in the right-of-way for the East Side Project that will serve the BP Tract, (e) claims and judgments arising out of contract disputes between BP and the contractor unless approved in advance by the County, and (f) all costs associated with utility construction, under-grounding and/or relocation to serve the BP Tract but excluding utility and other costs to be allocated to the police station.
  - The Non-Shared Costs payable by the City are (a) all costs associated with turning over right-of-way under the control of the City to the State for the construction of the I-270 Interchange and Watkins Mill Road and (b) the costs of supervision, inspection and certification of the Watkins Mill road Extension.
  - Non-shared costs payable by the County are any right-of-way acquisition required for the construction of the East Side Project that was not made a requirement for BP to acquire as a condition of approval by the City for the BP Tract and consistent with the terms of the approved SDP. [i.e. the Monument sliver].

# 5.4 Payment of Costs.

- (a) Periodically, but no more frequently than once each thirty (30) days, BP shall submit a written statement to the County setting forth in reasonable detail the Project Costs incurred or paid out by BP through the date of that statement and the amount of each party's Pro Rata Share of such Project Costs, less any amounts previously paid by that party for the Project Costs and substantially in the form of Exhibit "H\_" attached to and made a part of this Agreement. Within thirty (30) days after its receipt of the statement, the County shall pay to BP the outstanding amount of the County's Pro Rata Share of the Project Costs set forth in the statement, less ten percent (10%) retainage. The retainage shall be calculated solely on those Project Costs that are referred to in Section 5.2. Upon completion of fifty percent (50%) of the East Side Project, no further retainage shall be deducted from the County's payments. Within seven (7) days after receipt of each payment from the County, BP shall deliver the County's payment to the contractor or other person or entity to whom the payment is due. BP shall simultaneously deliver to the contractor or such other person or entity the outstanding amount of BP's Pro Rata
- (b) share of the Project Costs reflected in the statement, less retainage at the same percentage as the retainage that was withheld by the County in its payment. If the County fails to pay its Pro Rata Share of the Project Costs when due, the sum owed shall bear interest at the prime rate of interest then prevailing, as published in the Money Rates Section of the Wall Street Journal, plus two percent (2%), from the date the sum was due until the date the sum is paid. Such interest shall be paid by the County to BP upon demand.
- (c) The County's retainage shall be withheld until all of the following have occurred:
- (i) A ninety (90) day guarantee period with respect to the work has expired, without any outstanding claims by BP or the County relating to the work. The guarantee period shall begin upon the completion and acceptance of the project by DPWT.
- (ii) "As-built" drawings, certified by the Project Engineer, have been provided to the County in accordance with DPWT's guidelines for participation projects. These drawings must be in a reproducible form acceptable to the County.
- (iii) The streetlight and monument certification requirements provided for in the City permit have been satisfied.
- (iv) BP has paid its Pro Rata Share of the Costs if any signage and striping has been installed by DPWT's Division of Operations.
- (d) Each party shall pay its Non-Shared Costs under Section 5.3 as and when such Non-Shared Costs are due.

- (e) Within thirty (30) days after substantial completion of the East Side Project, BP must prepare and furnish to the County a preliminary accounting of the total project Costs and the sums paid by BP and the County under this Agreement. Within thirty (30) days after furnishing the accounting to the County, BP and the County shall make such adjustment between them as may be required to result in the allocation of expenses contemplated in this Agreement. Within thirty (30) days after receipt of final lien waivers from all contractors and subcontractors, the parties shall update and reconcile any differences from the preliminary accounting.
- 5.5 <u>Disputes</u>. All claims and disputes must be resolved in accordance with Section 11B of the Montgomery County Code and Chapter 11B of the Code of Montgomery County Regulations.
- 5.6 <u>Delivery of Bonds</u>. At or before the time it commences construction of the Watkins Mill Road Extension, BP must deliver to the County such bonds as required in Article 4.4.

#### ARTICLE 6: **Information**

6.1 <u>Progress Reports.</u> Following commencement of construction of the Watkins Mill Road Extension, BP must meet with the County at least monthly but more often as required by the County in its reasonable discretion, for the purpose of reviewing the progress of the East Side Project or must provide to the County written progress reports describing the work performed since the last report and setting forth the good faith estimated percentage of completion of the East Side Project. Meetings shall be held at a place and time selected by the County. BP must furnish to the County copies of the notice to proceed given by BP to the contractor under the construction contract. Prior to commencement of construction of the East Side Project, BP must keep the County informed of the status of the Plans and other material matters concerning the East Side Project.

#### ARTICLE 7: **Default**

### 7.1 Failure to Commence or Complete Work.

(a) If, for reasons other than the failure of one or more of the conditions set forth in Section 4.1 hereof, default by the City or the County hereunder or "Force Majeure" (defined in Section 10.6), BP fails to commence construction of the East Side Project on or before the Outside Commencement Date, fails diligently to prosecute the East Side Project after commencement of construction, or fails to substantially complete the East side Project on or before the Outside Completion Date, the County may give written notice to BP of its failure to perform its obligations under this Agreement. If BP does not cure the default within thirty (30) days following receipt of the notice, the County may, at its sole discretion, compel the Surety to cure the default, or assume the role of BP with respect to the construction of the unfinished portion of the East Side Project by giving written notice to this effect to BP. If, however, the default is not reasonably susceptible of being cured within thirty (30) days, the County may, in its

sole discretion grant BP additional time to cure the default as may be reasonable, provided that BP commences its efforts to cure the default within the initial thirty (30) day period and thereafter diligently prosecutes to the satisfaction of the County those efforts to completion. For the purposes of this Section 7.1(a), BP shall be deemed to have failed diligently to prosecute the East Side Project if BP, after commencement of construction, ceases performance of the work for more than thirty (30) consecutive days without the written consent of the County and for reasons other than Force Majeure or default by the County or otherwise in bad faith abandons the work. In the event the County assumes the role of BP under this Section 7.1(a):

- (i) BP shall deliver into a mutually acceptable escrow, security in form reasonably acceptable to the County and in an amount equal to the unexpended portion of BP's Pro rata Share of Project Costs plus retainage(the "Security").
- (ii) The County shall undertake construction of the unfinished portion of the East Side Project and shall have all of the rights and responsibilities of BP set forth in this Agreement relating to such construction (but the County shall not be deemed to have assumed any liability of BP which accrued under this Agreement prior to the date the County assumed the role of BP).
- (iii) The allocation of costs set forth in Section 5.1 and 5.3 shall remain the same. BP must pay its Pro Rata Share of the Project Costs to the County using the same procedure as would have been applicable to payments by the County to BP under Section 5.4 had the County not taken over the work.
- (iv) BP must immediately deliver to the County the Plans and all other materials in the possession or control of BP relating to the East Side Project. If BP fails to do so and the County has to undertake action to compel BP to produce the documents, BP will be responsible for all of the County's costs to obtain the Plans and other materials, including all legal and court costs and attorney's fees.
- (v) At the request of the County, BP must assign to the County the construction contract and any other agreements relating to the East Side Project as may be designated by the County. If BP fails to do so and the County has to undertake action to compel BP to assign the construction contract and any other agreements, BP will be responsible for all of the County's costs to compel BP to assign the construction contract and any other agreements, including all legal and court costs and attorney's fees.
- (vi) Upon substantial completion of the East Side Project by the County, BP must pay to the County, in addition to any other amounts payable under Section 7.1(a)(ii), an administrative and mobilization fee equal to five percent (5%) of BP's Pro Rata Share of the Project Costs incurred by the County after the County took over the work.
- (vii) If BP fails to make any payment required under this Section 7.1 (a) when due, and such failure continues for fifteen (15) days after BP receives

written notice from the County advising of the failure, the County shall have the right to draw upon the Security to the extent of the delinquent amount.

(b) The right to assume management and control over the completion of the East Side Project, recover the amounts due from BP under Section 7.1(a), and otherwise enforce the provisions of Section 7.1(a) shall be the County 's sole right or remedy in the event that BP fails to commence or complete the East Side Project as required or otherwise fails to perform or cause the performance of the work in accordance with this Agreement. Except for the amounts due under Section 7.1(a), the County shall not be entitled to recover damages from BP, for delay or otherwise, for any such failure. If the County does not elect to assume the performance of the work in accordance with Section 7.1(a), BP shall commence or recommence, as the case may be, the work as soon as is reasonably practicable. Despite the foregoing, nothing in this Section 7.1(b) shall be construed to limit the County 's rights and remedies in the event of negligence, fraud, intentional misconduct, or misapplication of funds by BP. Further, nothing contained in this Section 7.1(b) shall be construed to prohibit the County from obtaining injunctive relief to enforce the provisions of this Agreement.

## **ARTICLE 8: Approval Procedure**

- 8.1 <u>Change Orders.</u> Wherever under this Agreement any change orders are submitted to the County for approval, such approval shall not be unreasonably withheld or conditioned. Within fifteen (15) business days after receipt from BP of any such change order request, the County shall give written notice to BP approving or disapproving the requested change order. If the County fails to give any notice within the fifteen (15) business day period, the County shall conclusively be deemed to have approved the change order so received. If the County disapproves the change order submitted within the fifteen (15) business day period, the County shall specify its objections in writing and BP and the County shall promptly meet and attempt, in good faith, to resolve their differences.
- 8.2 <u>Permitting</u>. The City will be the permitting and inspecting authority for the East Side Project. BP must submit all plans to the City for approval in accordance with the City's permitting process. The City has final approval authority for the plans during design as well as changes during construction that require permit modifications.
- 8.3 <u>State Highway Administration</u>. In order to facilitate the ultimate transfer of the East side Project to the State Highway Administration (SHA), BP must submit all plans to SHA at the preliminary and final review stages. SHA will conduct a review of the plans to ensure that the proposed improvements conform to SHA standards. BP, the City and the County will coordinate to resolve any conflicts between comments from SHA, the County and/or the City. However, in accordance with Section 8.2 above, the City will have final approval authority. SHA may perform periodic inspections during construction to verify conformance to the approved plans.
- 8.4 <u>Design Phase Process</u>. During the design phase, BP must submit plans for approval in accordance with Article 2. BP must provide three (3) copies of each

submittal simultaneously to the County, the City and SHA. BP must compile review comments from all agencies and notify the County, the City and SHA of any conflicting comments. BP must track the disposition of all comments until they are resolved and the plans are approved.

- 8.5 <u>Bid Phase Process.</u> After the City of Gaithersburg has issued permits for the Watkins Mill Road Extension, BP must prepare an Invitation for Bids (IFB) in accordance with the County's policies and Procurement Regulations. BP must submit three (3) copies of the IFB to the County for approval. It is anticipated that at least two, but possibly more, submittals will be required. After BP has addressed all comments to the satisfaction of the County, the County will advertise the project. BP must initially prepare a minimum of thirty (30) copies of the construction plans and IFB to make available to prospective offerors, and must maintain a minimum of six (6) copies on hand throughout the Bid Phase. The County will open the bids and verify that the lowest bidder is responsible and responsive.
- 8.6 Construction Phase Process. BP must hold a pre-construction meeting prior to issuing Notice to Proceed to the contractor. At that meeting, the County will provide the Contractor with a Source of Supply spreadsheet, which must be completed and submitted to the County for approval. BP must obtain County approval for all materials prior to their use. The County will not authorize payment for unapproved materials. During the Construction Phase, BP must require the Project Engineer to perform material testing and construction inspection to verify that the contractor is in compliance with the Contract Documents. BP must also administer the construction contract in accordance with Articles 3 and 4. The County will provide oversight during construction to verify that BP is complying with the terms of this agreement, to ensure the proper use of public funds, and to act in the public's interest as necessary. The City will perform inspections to ensure compliance with the permits issued for the project. BP must submit all Potential Change Orders to the County for approval. The County will not authorize payment for unapproved Change Orders. BP must also submit to the City for approval any changes that require permit modifications.

# ARTICLE 9: Rights and Obligations of the City

- 9.1 <u>In General</u>. The City must fulfill all requirements of the Memorandum of Agreement for the Dedication of Land, Design and Construction of Watkins Mill Road (Exhibit "B").
- 9.2 <u>Dedications and Easements</u>. Prior to the outside commencement date, the City must turn over all the right-of-way it controls to the State, at no cost the State of the County, for the construction of the I-270 Interchange at Watkins Mill Road. In addition, the City commits to request the dedication of the remaining right-of-way for the Interchange at the time when development proposals are submitted to the City. That right-of-way, if dedicated to the City, must also be turned over to the State, at no cost to the County or State, within 90 days of such dedication.

- 9.3 <u>Construction of Watkins Mill Road Extension</u>. The City will be the permitting and inspecting authority for the construction of the Watkins Mill Road Extension. At the request of the City, the County may provide technical assistance to the City, such as Source of Supply approval, materials testing, coordination with the State Highway Administration and other services as may be required.
- 9.4 <u>Maintenance after Construction</u>. After the County has accepted the Watkins Mill Road Extension for ownership and maintenance, the City will be responsible for snow removal from the entire length of the Watkins Mill Road Extension for a period of ten (10) years or until such time as the road is turned over to the State Highway Administration, whichever is less. The County will have all other structural and maintenance responsibilities.

## ARTICLE 10: General

- 10.1 Insurance. BP and/or their contractors must maintain or cause to be maintained the following policies of insurance at the stated levels at all times without interruption during the contract/agreement term with an insurance company/companies licensed to do business in the State of Maryland and acceptable to the County's Division (a) commercial general liability insurance with minimum of Risk Management: \$2,000,000 per occurrence, combined single limit, providing coverage against claims on account of bodily injury and property damage that may arise from or be occasioned by the use of the easements granted herein by BP and/or their contractors, including the following coverage: contractual liability, premises and operations, and independent contractors; (b) worker's compensation insurance meeting all requirements of Maryland law with the following minimum limits: bodily injury by accident \$100,000 each accident; bodily injury by disease \$500,000 policy limits; bodily injury by disease \$100,000 each employee; and (c) automobile liability insurance with a minimum \$2,000,000 combined single limit for bodily injury and property damage coverage per occurrence including: owned automobiles, hired automobiles and non-owned automobiles. Policies of insurance provided for in this Section shall name the County and BP, as an additional insured (and for the County shall contain the following certificate holder information: Montgomery County Government, Attention: Mark Aebig Department of Public Works and Transportation, 101 Monroe Street, 10th Floor, Rockville, MD 20850). The policies must provide that they must not be cancelled without at least forty-five (45) days' written notice to the County. The insurance must be evidenced by a certificate of insurance, and if requested by the County, BP and/or their contractors must provide a copy of the insurance policies. BP and/or their contractor must maintain insurance satisfactory to the County until the Project is accepted by the County. If BP and/or their contractors fail to maintain insurance satisfactory to the County, the County will suspend payments of its Pro Rata Share of Project Costs until such insurance is reinstated. BP and/or their contractor's insurance shall be primary.
- 10.2 <u>Maryland Law</u>. This Agreement, and the rights and obligations of the Parties under this Agreement, shall be governed by the laws of the State of Maryland, without regard to principles of conflicts of laws.

- 10.3 <u>Amendments</u>. Amendments, modifications, supplements or changes to this Agreement shall be in writing, signed by all Parties.
- 10.4 <u>Severability</u>. Each provision of this Agreement is intended to be severable. If any term or provision of this Agreement shall be determined by a court of competent jurisdiction to be illegal or invalid for any reason whatsoever, such provision shall be severed from the Agreement and shall not affect the validity of the remainder of this Agreement.
- 10.5 <u>Headings</u>. Headings are intended only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Agreement.
- 10.6 <u>Force Majeure</u>. Despite any other provision of this Agreement, the obligations of the Parties under this Agreement shall be extended for a period of time equal to any period of prevention, delay or stoppage due events outside the control of either Party, including strikes; riots; insurrection; war; invasion; acts of terrorism; homeland security emergencies; fire, flood, or other casualty; natural disasters; unavailability of labor or materials, through means other than failure to timely order or procure; severely and unusually adverse weather conditions; defaults of the Contractor, or defaults of the other Party ("Force Majeure").
- 10.7 <u>Assignment</u>. This agreement is binding upon and shall inure to the benefit of the Parties, and may not be assigned by BP without the written consent of the County upon receipt by the County on an assumption agreement that is acceptable to the County in its sole and unfettered discretion. In the event of any collateral assignment or transfer of this Agreement by BP to a bona fide mortgagee, the mortgagee shall have no liability or obligation under this Agreement unless and until the mortgagee acquires fee simple ownership of the BP Tract.
- 10.8 <u>Notices</u>. All notices and other communications under this Agreement shall be in writing and shall be deemed duly given if (a) personally delivered (provided a signed written receipt is obtained), (b) sent by reputable commercial courier (provided a signed written receipt is obtained), (c) sent by certified mail, return receipt requested, first class, postage prepaid, or (d) transmitted by telecopy (provided evidence of transmission is obtained and the original of the notice is, on the same day, sent to the addressee by one of the foregoing methods of delivery). Notices shall be addressed as follows:

If to BP: Attn: Peter J. Henry c/o BP Realty Investments 10000 Falls Road Potomac, Maryland, 20854 Telephone No.:301.299. 2099 Telecopier No.:

With a copy to:

Richard M. Zeidman, Esq Linowes and Blocher LLP 7200 Wisconsin Avenue Bethesda, Maryland 20814

If to the County:

Director
Department of Public Works and Transportation
101 Monroe Street
10th Floor
Rockville, Maryland 20850

With copies (that does not constitute notice) to:

Construction Section Chief Division of Capital Development 101 Monroe Street, 11th Floor Rockville, Maryland 20850

Eileen Basaman, Esquire Office of the County Attorney 101 Monroe Street, 3rd Floor Rockville, Maryland 20850

If to the City:

With a copy to:

List Name/Address

Each party shall be responsible for notifying the other party of any change of address and telecopier number.

10.9 <u>Mechanic's Liens</u>. Provided that the County timely pays its Pro Rata Share of the Project Costs, BP will hold harmless the County against any mechanic's liens or other claims for payment filed or made by contractors or suppliers for work or materials furnished at the direction of BP in connection with the East Side Project. In the event any such lien or claim is filed, BP must satisfy the claim or cause any lien to be removed no more than 30 days after filing. The County will not accept the East side Project into the County road system until all claims and liens are satisfied and may

withhold the retainage and seek satisfaction from the surety for any liens or claims affecting the East side Project.

- 10.10 <u>Relationship of the Parties</u>. This Agreement does not create any partnership, joint venture or other similar relationship among or between any of the Parties, but is merely a means to perform certain improvements benefiting the Parties.
- 10.11 <u>Entire Agreement</u>. This Agreement and the Exhibits hereto contain the entire agreement among the Parties regarding the construction of the East side Project.
- 10.12 <u>Binding Effect</u>. This Agreement shall be binding upon and inure to the benefit of the Parties and their successors and assigns.
- 10.13 <u>Authority</u>. BP represents and warrants to the other that it has full power and authority to enter into and carry out this Agreement, without the need for obtaining any further approvals or consents (except for the governmental approvals contemplated by this Agreement).
- 10.14 <u>County Funds</u>. County funds will only be authorized for the purposes set forth in this Agreement upon execution of this Agreement by the Chief Administrative Officer of the County or his designee and appropriation of funds by the Montgomery County Council.
- 10.15 No waiver of Governmental Authority. Nothing in this Agreement may be interpreted to be a waiver of the County's or City's governmental authority or as a waiver of the requirement for BP to comply with all County or City laws, regulations, policies or standard procedures, including, but not limited to, the Montgomery County Procurement Regulations and all permitting processes required under County and City laws. This Agreement is not intended as an approval of any plans or permit applications.
- 10.16 <u>Indemnification</u>. Any obligation or liability of the County arising in any way from this Agreement is limited by the damage caps and notice requirements stated in the Local Government Torts Claims Act, Md. Code Ann., Cts. & Jud. Proc. §§ 5-301, et seq. (2002 Repl. Vol.) (the "LGTCA"); Md. Code Ann. Art. 25A, § 1A (2003 Repl. Vol.); and Md. Code Ann., Cts. & Proc. § 5-509 (2002 Repl. Vol.), (together, the "County Indemnification Statutes"), all as amended from time to time. Any indemnification given by the County in this Agreement is not intended to create any rights or causes of action in any third parties or to increase the County's liability above the caps provided in the County Indemnification Statutes, as applicable.

<u>Estoppel Certificates</u>. Within thirty (30) days after request by BP, the County shall execute and deliver to BP and/or its lender an estoppel certificate in the form of <u>Exhibit "I"</u> attached to and made a part of this Agreement.

10.16 No Third Party Beneficiary. Nothing contained in this Agreement shall be deemed to create rights or obligations accruing to the benefit of, or enforceable by, any entity or person not a party to this Agreement, including, without limitation, any

contractors, subcontractors or other parties providing labor, services, or materials in connection with the East Side Project.

10.17 <u>No Waiver</u>. Except where time periods are expressly provided in this Agreement for the exercise of rights or remedies, no failure or delay by BP or the County in exercising any of their rights or remedies under this Agreement shall result in any waiver of those rights or remedies with respect to any then existing or subsequently occurring breach or default by the other party.

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[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the Parties have caused this Agreement to be signed, sealed, and delivered by their duly authorized representatives the day and year first above written.

WITNESS:	BP Realty Investments a Maryland limited liability company
	By: Name: Title:
Maryland	THE CITY a political subdivision of the State of
	By: Name: David B. Humpton Title: City Manager
LEGALITY:	APPROVED AS TO FORM AND
	OFFICE OF THE CITY ATTORNEY
	By: Name: Cathy G. Borten Title: City Attorney
	Date:
	MONTGOMERY COUNTY MARYLAND, a political subdivision of the State of
Maryland	
Officer	By: Name: Joseph F. Beach Title: Assistant Chief Administrative

# [MORE SIGNATURES FOLLOW]

## **RECOMMENDED**

By:

Name: Arthur Holmes, Jr.

Title: Director, Department of Public

Works

And Transportation

Date:

APPROVED AS TO FORM AND

LEGALITY:

OFFICE OF THE COUNTY ATTORNEY

By:

Name: Eileen T. Basaman

Title: Associate County Attorney

Date: